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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D. H., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

RON P.,

Defendant and Appellant.

B207208

(Los Angeles County
Super. Ct. No. CK48287)

APPEAL from orders of the Superior Court of Los Angeles County, S. Patricia Spears, Judge. Reversed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and O. Raquel Ramirez, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Ron P. (Father) appeals from the jurisdictional and dispositional orders of the juvenile court declaring his daughter D. H. (D.) a dependent of the juvenile court. He contends, and the Los Angeles County Department of Children and Family Services (the Department) concedes, there is insufficient evidence to support the court's jurisdictional order. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Only a brief recitation of the facts is necessary. Father and Marilou H. (Mother) are the parents of D. (born May 2000). Father and Mother divorced and he married Mary P. (Stepmother). In March 2005, Father and Stepmother were granted physical custody of D. by the family law court, following their allegations that Mother was physically abusing D. Since gaining custody, Father and Stepmother continued to allege ongoing abuse of D. by Mother. They placed three calls to the Los Angeles County Sheriff's Department (February, March, and April 2006), which was unable to substantiate the claims of abuse. With regard to the last call in April, the Department was advised of the allegations. After an investigation, it deemed the allegations unfounded.

The Department inquired into new allegations in February 2007. Stepmother called the Department when she noticed that D. had a bruise on her face. D. told the emergency social worker that Mother had slapped her in the face while attempting to separate D. and her brother, J. H. The social worker saw a faint bruise on D.'s cheek. The social worker interviewed Mother, who denied that she had slapped D. Mother said she was tired of Father making false accusations against her.

On April 5, 2007, after reviewing the allegations that Mother had physically abused D., the Department was unable to determine if such abuse had occurred. However, it did conclude that there was a substantial risk of emotional abuse to D. "due to the ongoing conflict and custody dispute between [Mother], [Father], and [Stepmother]." As a result, the Department set up a voluntary initial case plan, in which Mother, Father, and Stepmother agreed to participate.

On June 1, 2007, Stepmother reported that D. claimed Mother had hit her during an overnight visit. An initial petition was filed. After further investigation, the Department became concerned that D. was being told by Father and Stepmother to make claims of physical abuse by Mother. An amended petition, filed on July 26, 2007, added the allegations at issue in this appeal. The Department charged, pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (c),¹ that there was a custody dispute between the two sets of parents which created an emotionally abusive environment for the child (count b-3) and that Father and Stepmother were coaching D. into making exaggerated allegations of physical abuse against Mother, which caused D. to suffer, or placed her at substantial risk of suffering, serious emotional harm (count c-1).

A contested adjudication hearing was held in September and October 2007. D. testified that when she and her brother behaved badly, Mother would hit them. Sometimes, Mother hit her on the hand and on her buttocks. D. said she told her social worker, Father, and Stepmother that Mother hit her. D. said the hitting left bruises, and the incidents took place a “very, very long time ago.” She stated she generally told Stepmother that Mother had hit her, and on one occasion, Stepmother took pictures of the bruises.

Mother claimed that the last time she spanked D. was in February 2005. She denied hitting D. on the occasions to which D. had testified. She stated that D. often did not tell the truth. Mother believed the ongoing dispute between Mother and Father was causing D. to suffer emotionally.

Amy-Ann Maughan, the social worker assigned to D.’s case, testified that she believed Father and Stepmother were “coaching” D. to make false statements against Mother. She based her opinion on the following: (1) when describing the incidents, D. used language not used by children her age; (2) she would respond to questions by saying, “I’m supposed to say” or “I think it’s this”; and (3) she would ask for time to

¹ All further statutory references are to the Welfare and Institutions Code.

think before she answered. Maughan said she had never seen such behavior by a child “in all [her] years of interviewing kids.” Maughan believed the questioning of D. concerning the alleged abuse and D.’s attempts to remember what she was supposed to say to investigators caused her severe emotional damage and anxiety.

Father testified that Stepmother took pictures of D.’s bruises. He submitted a number of photographs exhibiting D.’s injuries which corresponded to specific incidents when Mother allegedly struck D. He disputed that D. suffered from any emotional difficulties.

The court sustained count b-1, which alleged in relevant part, that Father and Stepmother encouraged D. to make exaggerated allegations of physical abuse against Mother and that D. suffered, or was at substantial risk of suffering, substantial physical harm as a result. The other counts were dismissed.

In November 2007, Father filed an application for rehearing.² His application was granted on December 3, 2007.

The rehearing began in February 2008. The court reviewed the evidence from the prior hearing and heard further argument from counsel. The court sustained count b-1³ and dismissed the remaining counts in “the furtherance of justice.” The court ordered D. removed from Father’s custody and placed with Mother. Father filed a timely appeal.

² The initial hearing was conducted by a referee. Under those circumstances, section 252 allows a party in a dependency proceeding to apply to the juvenile court for a rehearing.

³ We note that the court, although it specifically sustained the petition pursuant to the section 300, subdivision (b) allegation that charged D. had suffered, or was placed at substantial risk of suffering, serious physical harm or illness, determined that Father’s conduct “placed [D.] at risk of serious emotional harm.”

DISCUSSION

As we have discussed, the juvenile court sustained the petition pursuant to section 300, subdivision (b). “The statutory definition consists of three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Father contends, and the Department concedes, that the evidence failed to show that D. had suffered, or was at substantial risk of suffering, *physical* harm or illness. Father argues reversal of the jurisdictional order is required. The Department disagrees, urging that the amended petition alleged that D. suffered emotional harm within the meaning of section 300, subdivision (c), and it presented evidence to establish that fact. As a result, Father had notice and a full opportunity to be heard at the contested hearing with regard to that allegation. Thus, the Department asserts it would be proper to amend the juvenile court’s jurisdictional finding to conform to proof. Father does not directly address the Department’s contention, choosing instead to attack the sufficiency of the evidence to support the section 300, subdivision (c) allegation.

The difficulty here is that the juvenile court expressly dismissed the count c-1 allegation in the amended petition that charged “[D.] is suffering, or is at substantial risk of suffering, serious emotional damage evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others” caused by the ongoing custody dispute between Mother, Father, and Stepmother. In doing so, the court stated, “And I don’t think that there is evidence that it’s really a c-1 case. And that will also be dismissed in the furtherance of justice.” The court did not make clear what specific element had not been proven, that is, whether D. had not suffered, or was not at

substantial risk of suffering, the requisite emotional damage or that D.'s emotional harm was not caused by Father's conduct.⁴

On appeal, we review the juvenile court's jurisdictional findings for sufficiency of the evidence. (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) The Department is asking this court to review the record and reinstate an allegation the juvenile court dismissed. It does not cite authority for such a procedure, nor could we find any. Under section 356, the juvenile court hears the evidence and makes a finding whether the minor is a person described by section 300, which shall include "the specific subdivisions of Section 300 under which the petition is sustained." We are not a court of original jurisdiction in this matter, and we decline the Department's invitation to act in that capacity.⁵

⁴ For a child to be declared a dependent of the court pursuant to section 300, subdivision (c), the Department must prove: "(1) the offending parental conduct; (2) causation; and (3) serious emotional harm or the risk thereof, as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior." (*In re Alexander K.* (1993) 14 Cal.App.4th 549, 557.)

⁵ We do not address Father's claim that the Department failed to provide notice in compliance with the Indian Child Welfare Act. (25 U.S.C. § 1901 et seq.) The Department concedes notice was deficient, but argues reversal is not necessary. Given our disposition, any further proceedings can be preceded with proper notice.

DISPOSITION

The jurisdictional order declaring D. a dependent of the juvenile court is reversed.
All subsequent orders are vacated as moot.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.